The Central Law Journal.

ST. LOUIS, AUGUST 18, 1882.

CURRENT TOPICS.

The American Bar Association, in its meeting last week, devoted some time to the discussion of the relative merits of the majority and minority reports respectively, of the special committee of the association, appointed to consider the remedies proposed for the delay incident to the determination of causes in the Federal Supreme Court. We have heretofore rehearsed the most salient points of the two reports (14 Cent. L. J. 381), and have stated our reasons for believing that that of the majority, embodying substantially the same plan as that contained in the measure known as Ex-justice Davis' bill, was best adapted to accomplish the result desired. After an active discussion, in which Mr. Hitchcock, of St. Louis, Mr. Bonney, of Chicago, and Mr. Preston, of Kentucky, were conspicuous advocates of the majority report, and Mr. Evarts, of New York, of that of the minority, a ballot was taken, which resulted in the favor of the majority plan by a vote of 37 to 29. This result indicates a very substantial difference of opinion in the body of the Association, which is to be regretted, inasmuch as it necessarily weakens the influence of the body in the practical work of securing from Congress the appropriate and necessary legislation. It is to be hoped that the advocates of the opposing plans may, in the course of the ensuing season, arrive at something approaching an understanding, and by that means be able to bring to bear upon the national legislature the united influence of the Association in securing the realization of a single definite plan. At the same time, it seems to us that the first concessions, at any rate, should come from those who are not only in the minority in the Association, but also appeared to be so, in the last session, in Congress.

Among other interesting matters considered by the Association was the report of the Committee on Jurisprudence and Law Reforms, in pursuance of resolutions referred to them in 1879, 1880 and 1881. In it they proposed the following:

Resolved, That this association recommends the passage by the legislatures of the several States and Territories of the act relating to acknowledgments of instruments affecting real estate in the form reported by the committee, and that under the direction of said committee the several local councils be, and they are hereby, requested to further by all proper means the passage of such act by their State legislatures.

Resolved, That in view of the frequent occurrence of cases of irregular and fraudulent practices in the conduct of suits for divorce, involving abuse of the process of the courts, breach of professional obligations and connivance at actual crime, the local councils of the association and the several State and local bar associations be respectfully requested, as far as possible, to expose such irregularities and frauds, and to secure the punishment of all parties concerned in them.

Resolved, That in view of the growing evil of hasty and ill-considered legislation, and of defective phraseology in the statute law, the association recommends the adoption by the several States of a permanent system by which the important duty of revising and maturing the acts introduced in the legislatures shall be intrusted to competent officers, either by the creation of special commissions or committees of revision, or by devolving the duty upon the Attorney-General of the State.

A convention of *nisi prius* judges is in prospect in this State. We believe that this is something new, even in this land of conventions, where our first step towards the remedy of any given evils, is to assemble a large number of the persons, most interested and best informed on the subject, to talk about it, collectively. The convention in question will meet in response to the following circular from Hon. John L. Thomas, the judge of the twenty-sixth judicial circuit:

Hon. —— ——:

I and some of my brothers upon the bench have expressed a desire to meet all the *nisi prius* judges of the State. I suggest the consultation room of the judges in the court-house at St. Louis, and August 29, at 10 o'clock A. M., as the time and place when and where we can convene. The objects we have in view are:

1. To form each other's acquaintance.

2. To consult in reference to rules of practice and the various methods of transacting public business.

3. To consider such questions as are appropriate for us to consider under section 1066, Rev. Stat. 1879.

4. To determine whether it be advisable or expedient to organize permanently and meet at stated times in the future.

We confidently believe that much good may be accomplished by such a conference, that "legal reform" may be promoted and our judicial system elevated and improved. You are earnestly requested to attend, and we hope that you will take the same view of this matter as others take, and honor us with your counsel and advice. If it should be so you could not attend in person, we would be pleased to have you furnish the conference such written suggestions as you choose to

make touching the above topics or topics of a kindred nature. Please notify me whether you will be with us or not. JOHN L. THOMAS.

We hope that the meeting will be well attended. There is much good that can be accomplished by the interchange of ideas incident to such an occasion. We believe, too, that most of the judges would find in it an occasion of pleasant relaxation, of a kind much needed in the monotonous routine of their duties.

RECORD OF DEEDS, WHEN NOTICE, AND OF WHAT.

At common law no record was required of a deed; title was passed by the livery of seisin. By the statute of uses, deeds made under it were required to be enrolled. This enrollment is something distinct from the system of recording deeds universally adopted in the United States.[1] Enrollment is necessary to deeds under the English statute, but, as between parties, deeds of bargain and sales in the United States are generally good, although not recorded.[2]

Recording is, then, only necessary to give notice to third parties of the conveyance, and to preserve proof of it. As to notice to third persons, if actual notice exist, no record need be proved, but the deed is good as to such subsequent purchasers with notice.

What is actual notice is sometimes a matter of doubt. Whilst, in some States, the actual notice must be such as will prevent the grantee in a subsequent recorded deed from taking precedence of the grantee in a prior unrecorded one, on the ground that it would be fraud on the part of such grantee to purchase, attach or levy on the land to the prejudice of the first purchaser, generally whatever is sufficient to direct a prudent man's attention to the prior rights and equities of others, and enable him to ascertain them upon inquiry, will be sufficient to charge him with notice of such facts.[3] But it is less to the consideration of what is actual notice, than of what is the constructive notice arising from the record, and to what such notice extends, and whom it affects, and how it begins, and when, that the inquiry of this article is directed. And generally the notice is only of such things as appear properly by the record, so that if a deed be improperly recorded, it is not notice.[4] And it is notice only of such things as appear by the record, and no others. Such is the ruling of Chancellor Kent in Frost v. Beckman.[5] He held that the registry is notice of itself, and no more, and that the purchaser is not to be charged with notice of the contents of the mortgage any further than they may be contained in the registry. The purchaser is not bound to attend to the correctness of the register. It is the business of the mortgagee; and, if a mistake occurs to his prejudice, the consequences of it lie between him and the clerk, and not between him and the *bona fide* purchaser. "The registry is intended as the correct and sufficient source of information; and it would be a doctrine productive of immense mischief to oblige the purchaser to look at his peril to the contents of every mortgage, and be bound by them, when different from the contents as declared in the registry. The registry might prove only a snare to the purchaser, and no person could be safe in his purchase without hunting out and inspecting the original mortgage, a task of great toil and difficulty. I am satisfied that this was not the intention, as it certainly is not the sound policy of the statute." This ruling has been generally followed.[6] In Terrell v. Andrew County,[7] the court say, "it is contended here on behalf of the county that, according to our statute, when a person files with the recorder an instrument, it imparts notice of its real con-

1 Martindale on Conveyancing, sec. 269.

2 "In North Carolina, no conveyance shall be good unless the same shall be registered in the county where [the land shall lie within two years after the date of said deed." Laws 1876-7, chap. 23, sec. 1.

3 Martindale on Conveyancing, sec. 281, and notes.

4 Hainey v. Alberry, 73 Mo. 427, and cases cited; Dail v. Moore, 51 Mo. 589; Black v. Gregg, 58 Mo. 565; Stevens v. Hampton, 46 Mo. 404; Ryan v. Carr, 46 Mo. 483; Bishop v. Schneider, 46 Mo. 472; Martindale on Conveyancing, sec. 271, and notes and cases cited.

5 1 John. Ch., 288.

6 Sanger v. Craigne, 10 Vt. 555; Jennings v. Wood, 20 Ohio, 261; Shepherd v. Burkhalter, 13 Ga. 443; Terrell v. Andrew Co., 44 Mo. 309; Chamberlain v. Bell, 7 Cal. 292; Miller v. Bradford, 12 Iowa, 14; Baldwin v. Marshall, 2 Humph. 116; Brydon v. Campbell, 40 Md. 331; Breed v. Conley, 14 Iowa, 269; Gwynn v. Turner, 18 Iowa, 1; Gilchrist v. Gough, 63 Ind. 576, Chamberlain v. Bell, 7 Cal. 292; Barnard v. Campan, 29 Mich. 162; Digman v. McCollum, 47 Mo. 372.

7 *Supra.*

tents to all subsequent purchasers, regardless of any mistake that the recorder may commit in placing it on record." * * * * "According to the literal interpretation of the section, no notice is imparted till the instrument is actually placed on record, and then it relates back to the time of filing. It was, no doubt, the intention of the legislature to give a person filing an instrument or conveyance all the benefit of his diligence, and when he deposits the same with the recorder and has it placed on file, he has done all that he can do, and has complied with the requirements of the law. From that time it will give full notice to all subsequent purchasers and encumbrancers. A person in the examination of titles, first searches the records; and, if he finds nothing there, he looks to see if any instruments are filed and not recorded. If nothing is found, and he has no actual notice, so far as he is concerned the land is unencumbered. If he finds a conveyance, he goes no further; he never institutes an inquiry to find whether the deed is correctly recorded, or the contents literally transcribed. Indeed, to attempt to prosecute such a search would be idle and nugatory. * * * * Hard and uncertain would be the fate of subsequent purchasers, if they could not rely upon the records, but must be made under the necessity, before they act, of tracing up the original deed to see that it is properly recorded. The statute says that when the deed is certified and recorded, it shall impart notice of the contents from the time of filing. Certainly, but this is to be understood in the sense that the deed is rightly recorded, and the contents correctly spread upon the record. It never was intended to impose upon the purchaser the burden of entering into a long and laborious search to find out whether the recorder had faithfully performed his duty."

This was a case where a mortgage for $400 was recorded as one for $200 only. It has been, however, held *contra*, that a party performs his duty by leaving his deed for record with the proper officer, and the mistake or faults of the officer do not affect his right.[8] In this case there was a strong suspicion that the record had been tampered with, and it was held that the certificate of the recorder was proof that the deed had been recorded. So in Alabama under a statute making a conveyance operative as a record from the time it was left for registration, held that a mortgage was a valid lien for the whole amount, though incorrectly recorded for a smaller sum.[9]

It is held that the record of a deed is notice, whether indexed or not.[10] In Sawyer v. Adams, the town clerk copied a deed delivered to him for record on a book which had ceased to be a book for recording for a number of years, and for the purpose of concealment and fraud, did not insert the names in the index. Held, the deed was not recorded. In Bishop v. Schneider, a distinction is drawn between this case and one where the deed was regularly spread upon the record, but simply not indexed; the court quoting from Curtis v. Lyman,[11] where it was held that the index was no part of the record, continues that "the proper office of the index is what its name imports—to point to the record—but that it forms and constitutes no part of the record. The statute states, without reserve or qualification, that when an instrument is filed with the recorder and transcribed on the record, it shall be considered as recorded from the time it was delivered. From that time forth it is constructive notice of what was actually copied. A subsequent section for the purpose of facilitating research, besides recording, devolves a separate, distinct and independent duty upon the recorder, and in the event of non-compliance with that duty, the party injured has his redress. The purchaser or grantee, when he has delivered his deed, and seen that it was correctly copied, has done all that the law requires of him for his protection; and if any other person is injured by the fault of the recorder in not making the proper index, he must pursue his remedy against that officer for the injury."

But, though the index is generally not considered part of the record, the entry-books required to be kept, on which the names of grantors (or mortgagors), grantees (or mort-

[8] Merrick v. Wallace, 19 Ill. 486.

[9] Mims v. Mims, 35 Ala. 23. See, also, Dubose v. Young, 10 Ala. 365; Bank of Kentucky v. Hagan, 1 A. K. Marsh, 306.

[10] Bishop v. Schneider, 46 Mo. 472; Chatham v. Bradford, 50 Ga. 327; Musgrove v. Bouser, 5 Oreg. 313; Board, etc. v. Babcock, Id. 472; Curtis v. Lyman, 24 Vt. 338. But see Speer v. Evans, 47 Pa. St. 144; Barney v. McCarty, 15 Iowa, 522; Whalley v. Small, 25 Iowa, 188; Sawyer v. Adams, 8 Vt. 172.

[11] 24 Vt. 338.

gagees), date of reception, description of land, etc., are entered, under statutes providing that an instrument shall be considered as recorded at the time so noted, are so considered, and the purchaser takes with notice of such things as are properly placed on said entry books.[12] In this case the name of the mortgagee was omitted from the record, but appeared on the entry-book. Held, "that this error did not defeat it as to subsequent purchasers, as the two books together supplied all necessary information." It is said in effect by the court, that the mortgage was recorded when noted in the entry-book, that some time must elapse between the entry and the actual copying of the instrument upon the record-book, and during such time the entry-book will constitute the record, not complete in itself, as not containing a particular description of the land, but directing the inquirer to the deed on file, the two together giving full information. They ask, when did it cease to be recorded? "Was it when a more complete record was attempted?" "No doubt the entry in the entry book loses its importance when the instrument entered is properly recorded, because from that time the completed record gives the fullest information, and it will be that to which the index will refer persons who are searching the records. But it will remain a record nevertheless, and it may have its importance in some cases. Every man who finds a mortgage recorded, is notified by the date of the record, that there is a record of certain particulars respecting the mortgage in the entry-book, which he can at once refer to; and if any of those particulars chance to be omitted in the record-book of mortgages, he understands where he can obtain information concerning them." The case is contrasted with that of Jennings v. Wood,[13] in which the name of the grantor was omitted in the record, for the opinion continues, "for means of tracing the conveyances are lost when you do not find in the index as grantor or mortgagor, the name of the party in whom the title appears to stand." The case of Jennings v. Wood was one in which a deed was recorded as that of Samuel Granger, when it should have been Lemuel. Held, no notice to purchasers as deed of Lemuel Granger. This case is not nconsist ent with that of Gilchrist v. Gough,[14] where, under a statute of the same character with the Michigan statute, the record of a mortgage for $5,000 was erroneously made as for $500, but the entry-book correctly stated it as being one for $5,000. It was held that the entry-book was notice only of such things as the statute in express terms required to be noted in it. Such entries were notice of the existence of the deed, its exact date of reception, of the parties thereto, grantors and grantees, and of the description of the lands to be affected thereby; but the fact that an entry must also be made of the volume and page where such deed or other instrument could be found of record, showed very clearly, the court thought, that it never was intended that the entry in the "entry-book" should be notice of the contents of such deed or instrument. They held, moreover, that actual knowledge of the mortgage being indexed as one for $5,000, did not put a person on inquiry. So it may not conflict with Terrell v. Andrew County, for in that case a mortgage for $400 was recorded as one for $200; and further, the Missouri statute differs from that of Michigan and Indiana, the latter saying that "such instrument shall be deemed as recorded at the time so noted;" while the Missouri statute provides, "Every such instrument in writing, certified and recorded in the manner hereinbefore prescribed, shall, from the time of filing the same with the recorder for record, impart notice to all persons of the contents thereof," etc. The court, in Terrell v. Andrew County, saying that under it, it was the record that imparted notice which related back to the time of filing.

As to defects in deeds or their acknowledgment, in Missouri the court held in McClurg v. Phillips,[15] that an unsealed mortgage was properly recorded as an equitable mortgage.[16] So as to official seals, the record need not show any copy of the seal or scroll as indicating the officer's seal, the statement in the certificate raising the presumption that the seal was attached.[17] On the other hand, "a notary's certificate is not rendered invalid by

[12] Sinclair v. Slawson, 11 C. L. J., 68.
[13] 20 Ohio, 261.
[14] 63 Ind. 576.
[15] 57 Mo. 214.
[16] See, too, Parkinson v. Caplinger, 65 Mo. 290.
[17] Geary v. Kansas City, 61 Mo. 378; Griffin v. Shefaeld, 38 Miss. 359.

reason of the mere fact that it purports to be executed under his 'hand and official signature,' and that his notarial seal is not mentioned therein, where the seal is attached to the certificate. And in such case, a copy taken from the recorder need not have the impress of the original seal; that may be indicated by a scroll." [18]

In many of the States time is allowed parties to record their deeds, and if recorded within that time, they are valid as against purchasers after its date and before record. In such cases, the record may be considered notice from the date of the deed, or as relating back to the date of the deed. Is a party who actually sees an imperfectly acknowledged conveyance, affected with actual notice? In Musick v. Barney,[19] it is said that it would be very strong, if not conclusive, evidence of such notice. So, if the party's agent or investigator saw such a deed, it should put him on inquiry, as affecting him with actual notice of such deed.

T. W. PEIRCE.

St. Louis, Mo.

[18] Dale v. Wright, 57 Mo. 110; Clark v. Rynex, 53 Mo. 380.
[19] 49 Mo. 458.

THE LEGAL POSITION OF THE SUEZ CANAL.

International rights over artificial water ways from sea to sea, and their relation to those of the power owning the territory in which such ways are situated, will probably form an important branch of the international law of the future. At present there are hardly any instances upon which a discussion of such rights can be founded. But in view of the important questions which must soon be settled as to the Suez Canal, it may be interesting to examine what the legal position, so far as law can be held to apply to a subject matter so new and so anomalous, of that undertaking is.

The relations of the company to the Egyptian Government and its suzerain are defined by concessions granted by the Khedive in 1854 and 1856, and finally ratified by the Sultan's firman of the 22nd of February, 1856.

The most important articles provide that the canal shall be kept open at all times as a neutral channel to the merchant ships of all nations without distinction or preference, the company being allowed to charge a toll not exceeding 10 francs per ton. The company is declared to be an Egyptian one, and all disputes between it and the Egyptian Government or third parties are to be decided by the local tribunals according to the laws of the country and to treaties; but as regards its internal affairs, and the rights of its shareholders, it is declared to be a French *Societe Anonyme*, and subject to the laws regulating such societies. The canal and its dependencies are made subject to the police of the Egyptian Government, in the same manner as the rest of its territory. Certain land upon the banks is given up to the company, but the government reserve power to take back and occupy any points of strategic importance, agreeing not to interfere with the navigation of the canal. The concession terminates at the end of ninety-nine years, unless a fresh agreement is entered into, and it is provided that the 15 per cent. share of profits given to the khedive is to be increased by 5 per cent. on every such fresh agreement till it has reached 35 per cent.

There is nothing in this concession which in any way abandons the sovereign rights of the Egyptian Government or its suzerain, the Sultan, over the canal, nor which gives any rights to any other power. It is simply a private contract between the Khedive and the company, ratified by the Sultan. Acting upon this view the company, soon after the opening of the canal, obtained leave from the sulten to charge a sur-tax of one franc per ton for the passage of vessels, and they then further increased the toll without such leave by charging upon what they considered the actual capacity instead of, as at first, upon the registered tonnage of vessels using the canal. The sultan, pressed by the powers to put an end to this exaction, called a conference in October, 1873, at Constantinople, to agree upon a general standard of tonnage. The conference wisely refused to embark upon this general question, but agreed upon a mode of measurement which they considered fair for the Suez Canal, and recommended the Porte that the company should be compelled to adopt this measurement, and at the same time should be allowed to charge a sur-tax of three francs per ton, to be reduced upon a

sliding scale as the tonnage of ships using the canal increased. The Porte accepted these recommendations, and at the same time voluntarily declared that the Turkish Government would not allow any increased toll to be levied without its consent, and would come to an understanding with the principal powers interested before coming to a decision.

The Powers throughout the negotiation recognized the absolute right of the Porte to regulate the tolls, and the recommendations of the Conference were carried out as the act of the Porte. The company refused to accept the terms agreed upon, and even issued a notice that the canal would be closed. They only yielded under pressure of the despatch of an Egyptian force to seize the canal; and accepted the new dues only under protest until 1876, when an agreement was come to slightly modifying in the company's favor the terms imposed by the Conference. About the same time a dispute arose as to jurisdiction, the company claiming to have all disputes in which they were concerned tried by the French Consular, instead of the Egyptian Court. The French Government, however, repudiated any claim that the company was solely under French jurisdiction, and the controversy came to an end on the establishment of the international tribunals in Egypt in 1874. The purchase of the Khedive's shares by the English Government, though it gave the Government a *locus standi* to enforce the rights of the company in the agreement with the Khedive and the Sultan, could not affect its international position, and some negotiations, which were started shortly before that purchase, for the handing over the management of the canal to an International Commission, fell to the ground before the decided opposition of the Porte. At the outbreak of the Russo-Turkish war, M. de Lesseps proposed a general agreement between the European Governments, that the canal should at all times be open for ships of war as well as of peace, the disembarkation only of troops and munitions of war being forbidden. Lord Derby, however, refused to entertain the proposal of any such agreement, and contented himself with a notice to both the beligerent governments that any attempt to stop the canal would be incompatible with the maintenance of Her Majesty's Government of passive neutrality. It would seem, therefore, that there are no special international obligations affecting the Suez Canal at all. It is simply a part of the territory of Egypt and her suzerain the Sultan, subject in all respects to their control, but leased for ninety-nine years to a company formed under and governed by French law, upon terms which, in so far at least as regards the tolls to be levied for passage, the Sultan has voluntarily declared he will not alter without consulting the Powers. It is also subject to whatever rights of user can be claimed over it by international law in consequence of its being one of the highways of the world, and the only passage between two open seas, which rights have been to some extent recognized by the voluntary declaration of the Sultan above referred to. What the measure of such right may be it is impossible to say, but they can not be greater than those which obtain in a natural strait between two seas where both shores are in the territory of the same power. It seems to be the accepted opinion of the jurists that in such a case, while the territorial power has no right to prevent the passage of merchant ships, no other power has a right to claim passage for ships of war, or troopships. In law, therefore, as well as in fact, the canal can only be kept open for English troopships and ships of war either by special treaty with all the European powers or by England's possessing in some form or another the control of the territory within which the canal is situated.—*Law Times.*

PERJURY—SUBSIDIARY FACTS—ILLEGAL EVIDENCE, THOUGH WITHDRAWN FROM JURY.

STATE v. MEADER.

Supreme Court of Vermont.

1. In a justice trial, the respondent being defendant, the question was the ownership of a certain sled, and the fact whether he had painted it, to disguise it, bore directly upon the issue. Knowingly swearing falsely that he did not paint it was perjury.

2. The admission of illegal evidente, if objected to, though under an offer of connecting it with other proof that would render it competent, and, though charged out of the case by the court, is a cause for setting aside a verdict, unless the court ss able to say affirmatively that it worked no injury to the adverse party.

Indictment for perjury. Trial by jury; plea, not guilty; verdict, guilty; at the June Term,

1881, Caledonia County, Ross, J., presiding. It was claimed that the respondent committed perjury at a justice trial, in which one Chase and wife were plaintiffs, and he defendant. The evidence on the part of the State tended to show that Meader had an old traverse sled, and that before this trial he painted it so as to imitate the sled Chase had lost; that soon after it was lost on one Sunday morning, the forward part of a traverse sled was suspended on the sign-post of the old hotel at Danville; that this sled belonged to Mrs. Chase; that after dark Meader took it down and carried it into the hotel occupied by himself; that at the justice trial Meader was a witness, and produced a sled in court, and testified that the sled he produced in court was the same identical sled he took down from the sign-post; and that it was his own sled, and that it was then in the same condition as it was when he took it down.

The evidence tended to show that the sled produced by Meader in court had been recently painted, and not then dry; and had only two beams, and was a hind traverse, and was fixed up to imitate Chase's sled, or the one that was on the sign-post. The State produced one Frank Burdick, who testified, against the objection of the respondent, substantially as follows: "Can not tell how long the sled had been painted; it was new paint. I mixed some paint for Edwin Taylor; George Taylor, his son, came and got the paint and paid for it. Mixed a small quantity. Taylor came to me Saturday night for it. He got it Sunday about half past eleven o'clock. Mixed white lead, prussian blue, turpentine, japan and a little oil. Put in some turpentine, not much japan. Could not say how soon it would dry. When he got the paint he went on the opposite side of the street. My shop is in the building where Meader lives. Color of sled light blue. Think not same shade as sold" There was no evidence in the case tending to show that the respondent, or any one for him, had anything to do with this paint, or that it was used on this sled. But there was evidence tending to show Taylor got it and used it for his own use. When this evidence was offered and admitted, the prosecution stated that it expected to show that the respondent used this paint to paint the sled, by George Taylor, who was summoned as a witness. George Taylor was taken sick and not able to be present to testify, so this testimony was not connected with the respondent.

J. P. Lamson, for the respondent; *Henry C. Bates*, State's Attorney, and *Harry Blodgett* with him, for the State.

POWERS, J., delivered the opinion of the court:

Mrs. Chase, in the action tried before Justice Cook, sought to recover damages for the conversion of a sled by the respondent to his own use. The only sled that she claimed as her property, was the one suspended from the sign-post opposite the old hotel where the respondent lived, and which sled the respondent conceded he took down from said sign-post. Both parties claimed title to this sled; and the indictment charges that among other things the respondent testified, in the action aforesaid, falsely upon this question of his title to the sled.

The respondent requested the court "to hold and charge that it was necessary for the State to prove and establish beyond a reasonable doubt, that the sled suspended on the sign-post was the property of Chase, to constitute perjury." The court refused so to hold.

The assignment of perjury on which a conviction is asked, must be in a fact, or state of facts, principal or subsidiary, which are material to the issue, in a judicial inquiry. The principal, material fact in the action before Justice Cook, as the parties made their case, was whether the sled suspended from the sign-post was the property of Mrs. Chase or the respondent. If Mrs. Chase failed to show title to that sled, she failed in the action. Any fact offered in evidence, therefore, tending to show title to the sled in the respondent, bore directly upon the issue on trial. And any evidence tending to weaken the respondent's claim of title bore upon the issue and was material. If the respondent had used any device to destroy the means of identification of the sled, it was evidence tending to show that the respondent did not regard his title as unimpeachable, or that he needed to destroy the chances of Mrs. Chase in establishing her title. Evidence, therefore, that the sled had been newly painted by the respondent had a direct bearing upon the disputed question of ownership, and was thus material to the issue. False swearing that goes to a point, the existence of which affects the question in controversy, is perjury.

The respondent's request limited the right to convict of perjury to the single question of false testimony respecting the ownership of the sled suspended from the sign-post. As the court remarked in refusing to answer the request, a case might be stated where the proposition embodied in the request would be sound. If the only question before the jury was whether the respondent had testified falsely respecting his title to that sled, it would be necessary for the State to prove the testimony false, and this would necessitate proof beyond a reasonable doubt that the respondent did not own the sled.

But the respondent may have testified falsely upon the subsidiary question respecting the painting of the sled, and if so, the mischief of false testimony, as it tends to obstruct public justice, would follow. Hence, the request circumscribed the State within too narrow limits, and was rightly refused. As already said, the question whether the respondent painted the sled was material. The indictment charged it to be so, and it was made so in the evidence as the trial in the case proceeded.

To show that the respondent did paint the sled, the State offered to show by Burdick that he mixed some paint for Taylor on Sunday, the day the sled was found suspended from the sign-post

the State's attorney informing the court that he expected to prove by Taylor that this paint was used upon the sled. Under this offer, and against the objection of the respondent, the evidence was admitted. The court, however, told the jury that this evidence would go for nothing unless it was connected with the respondent. Taylor was not used as a witness, and thus no direct agency of the respondent in the use of this paint was shown.

Any evidence tending to show that the respondent had disguised the sled with paint would obviously prejudice the respondent's case. The sled itself was evidence on the question of ownership. The State sought to prove its ownership in Mrs. Chase, and any destruction of evidence, or impediments placed by the respondent in the way of its identification, would raise a presumption against him. *Omnia praesumuntur contra spoliatorem.* The new paint on the sled, not explained by the respondent, getting the paint at Burdick's on Sunday, so near the time when the sled was taken by the respondent into his possession, and the other circumstances connected therewith, furnish a basis for unfavorable inferences in the minds of the jury. That Burdick mixed the paint that was used upon the sled was the theory of the State, as is shown by the offer of his evidence.

It is an elementary principle that illegal evidence shall not be weighed by the jury. This rule is of the highest significance in a criminal case. Oftentimes evidence, standing alone, when offered is clearly inadmissible, and requires the aid of supplementary proof to be made competent. The convenience of the party or the exigencies of the case, may render it eminently proper for the court to allow it to come in under an assurance that the necessary supplemental proof shall be supplied. But in all cases it is obvious that improper evidence, however it gets into the case, and with whatever motive it may be offered, is liable to work mischief to the adverse party. The motive with which it is offered only goes to the good faith of counsel: it does not change the character of the evidence itself. The court may attempt to destroy its mischievous effect, by instructing the jury to ignore it; but there is no certainty that the attempt will be successful.

Accordingly, it is now the settled law in this State, that illegal evidence, if objected to, though admitted under an offer to so connect it with other proofs as to make it competent, will vitiate a verdict for the party offering it, if the proposed connection is not established, unless the court is able to say affirmatively, that such evidence worked no injury to the adverse party. It is not apparent how any embarrassment can arise in the trial of cases under this rule. The party offering such evidence is simply compelled to take the risk of the experiment. If he fails, he, not his adversary, should be the loser. He has no more right to hold a verdict obtained by such evidence when offered in good faith, than one when he offers the evidence in bad faith. The rights of the adversary are imperilled to the same extent in either case, and these are the rights calling for protection. The rule has a tendency to discourage bad faith in parties, in their offers of evidence, as they understand that such evidence can not ultimately aid them. Ch. J., Pierpont, laid down this rule in C. & P. R. Co. v. Baxter, 32 Vt. 805. He reiterated it in Boyd & Wife v. Readsboro (Windham County Sup. Court, February Term, 1879, unreported), where the court admitted improper evidence, under objection, and afterwards, of its own motion, changed the ruling and instructed the jury to disregard the evidence. He again reiterated the rule in State v. Hammond (Windsor County Sup. Court, February Term, 1879), a case not reported. In Stirling v. Stirling (41 Vt. 80), the late Judge Peck, speaking of this rule with approval, and of the difficulty of getting rid of the impression left by such evidence on the minds of the jury, says: "It has already had its influence on the minds of the jury, and it would be extremely improbable, if not impossible, that the jury could know what their conviction would have been on the material fact, had this evidence not been in the case." Poland, C. J., in Wood v. Willard (36 Vt. 82), approved the rule as laid down in the case in the 32d Vt., *supra*, and said: "It is not enough to allow us to disregard the introduction of improper evidence, that it might not have been injurious to the party against whom it was given; we must be able to say that it could not. For this reason we think the judgment must be reversed." To the same effect is the opinion of Redfield, J., in Hodge v. Bennington (43 Vt. 450). The late lamented chief justice, whose wisdom, as Lamartine said of Mirabeau, was "the infallibility of good sense," in the case of Boyd v. Readsboro, *supra*, in speaking of the futility of any attempt to charge improper evidence out of the case, made use of one of those simple illustrations, oftentimes equivalent to actual demonstration, for which he was so much noted. He said, the school boy uses his sponge to rub out the pencil marks on his slate. He eventually discovers that at some time—he never can tell when—his pencil has scratched, and learns to his sorrow that the ugly evidence of the fact, however vigorously he may apply his sponge, can not be removed. The question in all cases is not whether the court, if trying the case, would disregard the obnoxious evidence, but whether the court is assured that the jury has done so.

Looking at Burdick's testimony in its relation to the other facts in evidence, and as it tended to support the theory of the prosecution, and the mishap that deprived the State of the evidence of Taylor—the tenor of whose testimony had been disclosed in open court—it is more than probable that the disputed question whether the sled had been newly painted, was affected by the circumstances detailed by Burdick. The respondent's exception, therefore, to this testimony is sustained. The sentence is vacated, the judgment reversed, and the case remanded for a new trial.

CONSTITUTIONAL LAW — STATUTES APPLICABLE TO POPULATION — SPECIAL LEGISLATION.

STATE *EX REL.* v. HERRMANN.

Supreme Court of Missouri, May, 1882.

1. Special legislation being prohibited by the Constitution, courts will not sustain statutes of which the form alone is general, but whose operation and effect are special.

2. Courts take judicial notice of the population of localities within their own State, as ascertained by the Federal census.

3. A statute, applicable to cities of a named population, is a special law when it obviously operates only upon a present state of facts, and can not by possibility apply to other cities that may in future attain the named population.

4. A statute which selects particular individuals from a general class, and subjects them to peculiar rules from which others in the same class are exempt, is a special law.

The case was *quo warranto* against a notary public, appointed under the law in force prior to the statute discussed in the opinion.

On rehearing, the cause was orally argued by *Attorney-General D. H. McIntyre*, for respondent, and by *Shepard Barclay* for appellant; and briefs were submitted by *A. Hamilton* and *C. P. Ellerbe*, for respondent, and by *Marshall & Barclay* for appellant.

SHERWOOD, C. J., delivered the opinion of the court:

This cause has been re-argued upon the single point of the constitutionality of the fourth section of the Notary Act (Sess. Acts 1881, p. 172). That act is as follows:

"Be it enacted by the General Assembly of the State of Missouri, as follows:

Section 1. The Governor shall appoint and commission, in all cities having a population of 100,000 inhabitants or more, one notary public only to every 3,500 inhabitants in said cities; providing, that notaries, when receiving their commissions as such, and before qualifying as such, pay into the treasury of the State, to the use of the common school fund, the sum of twenty-five dollars each.

Sec. 2. The notaries public so appointed and commissioned shall be men of good moral character, and shall possess all the qualifications and exercise all the duties heretofore provided by law for notaries public, and shall give bond in the sum of $10,000; such bond to be given under the provisions of section 6463 of ch. 134, of the Revised Statutes of the State of Missouri.

Sec. 3. The last national census preceding each appointment shall be taken as a basis upon which to make said appointment of notaries public, and the Governor shall only appoint and commission persons as notaries public, when it shall appear to him that the number of notaries public, in all cities having a population of 100,000 inhabitants, is less than the number authorized to be appointed by this act.

Sec. 4. All acts and parts of acts inconsistent with this act are hereby repealed, and the office of any notary public in such city holding a commission bearing date prior to the passage of this act, and whose term of office as such notary public has not expired at the time this act becomes a law, shall be abolished at the expiration of ten days after the taking effect of this act; and every person who shall act or assume to act as notary public after his office shall be thus vacated, or after his term shall have expired, or without legal authority to act as notary public, shall be guilty of a misdemeanor.

Approved March 24, 1881."

If section 4 is to be regarded as a special law, then, of course, it falls within the prohibition of the Constitution; if a general law, then our judgment affirming that of the St. Louis Court of Appeals must stand. The point thus presented for our consideration, the difference between a general and a special law, has been extensively discussed and frequently adjudicated in those States possessing constitutions substantially identical with our own. We will now advert to and quote from some of the leading decisions, and endeavor to deduce the principles which they announce.

In State *ex rel.* v. Hammer, 42 N. J. L. 435, a law was assailed on the ground of being a special law, and the Supreme Court, in discussing the point, say:

"It does not profess to be such, for its title is 'An act relating to the assessment and revision of taxes in cities in this State.'" But this descriptive generality is immediately dwarfed and curtailed by the initial words of the body of the enactment, for it at once proceeds to declare 'that in any city of this State where a board of assessment and revision of taxes now exists, such board,' etc., the effect being to restrict the operation of the law to those certain localities that were possessed, at the time of the passage of the enactment, of the body of officers so designated. The evidence before us shows that there were only two localities so circumstanced, the one being the City of Elizabeth and the other the City of Newark. The result, therefore, is, that the act was intended to apply, and that it does and must ever apply to these two cities alone, and that the legal effect of this law, as now constituted, is the same as though it had, in express terms, declared that it was not to be operative through the State at large, but in the cities of Elizabeth and Newark only. Can a law thus designated and framed stand the constitutional test?" And the law was held special and therefore void. That case is not, as counsel assert, in "direct conflict" with that of Van Riper v. Parsons, 40 N. J. L. 1, for Beasley, C. J., delivered the opinion of the court in each instance, and, in commenting on the case last cited, says:

"But a single argument has been presented in its support, which is, that this act is general in its terms, and embraces 'all of a group of objects

having characteristics sufficiently marked and distinguished to make them a class by themselves.' And these qualities, it is contended, bring this case within the requirements of the Constitution, as the same is expounded in the case of Van Riper v. Parsons, 11 Vroom, 1. But I do not understand that the decision thus invoked will bear the construction thus put upon it. It does not undertake, as I understand it, to lay down any abstract rule on this subject, but the expressions quoted are employed in reference to the facts then under adjudication. Plainly, a law may be general in its provisions, and may apply to the whole of a group of objects having characteristics sufficiently marked and important to make them a class by themselves, and yet such a law may be in contravention of this constitutional prohibition. Thus, a law enacting that in every city in the State in which there are ten churches there should be three commissioners of the water department, with certain prescribed duties, would present a specimen of such a law, for it would sufficiently designate a class of cities, and would embrace the whole of such a class; and yet it does not seem to me that it could be sustained by the courts. If it could be so sanctioned, then the constitutional restriction would be of no avail, as there are few objects that can not be arbitrarily associated, if all that is requisite for the purpose of legislation is to designate them by some quality, no matter what that may be, which will so distinguish them as to mark them as a distinct class." So, in Pennsylvania Mr. Justice Paxson, who delivered the opinion of the court in Wheeler v. Philadelphia 77 Pa. 338, also delivered the opinion of the court in Commonwealth v. Patton 88 Pa. 258, and consequently must be presumed entirely familiar with any points of similarity or dissimilarity between the two cases. In the latter, the act of Assembly of 18th of April, 1878, was brought under discussion. That act provided among other things, "that in all counties of this commonwealth where there is a population of more than 60,000 inhabitants, and in which there shall be any city incorporated at the time of the passage of this act, with a population exceeding 8,000 inhabitants, situated at a distance from the county seat of more than twenty-seven miles by the usually traveled public road, it shall be the duty," etc. And the learned judge in discussing the act said: "The vital and controlling point in the case is whether the said act is obnoxious to the Constitution, as being special legislation within the terms of the constitutional prohibition. It was contended for the relators that the case came within the ruling in Wheeler v. City 77 Pa. St. 338, and that the act was general inasmuch as it applies to certain counties in the State as a class. A comparison of the act in question with the act of 23d of May, 1874, under which the case of Wheeler v. City arose, will show some marked features of dissimilarity. The act of 1874 provided for the classification of the cities of the commonwealth. For the exercise of certain corporate powers and having respect to the numbers, character, powers and duties of certain officers thereof, the cities then in existence or thereafter to be created in this commonwealth, were divided into three classes. It is true that in that classification the City of Philadelphia was the only city of the first class. But, as was said in Wheeler v. City, legislation is not intended for the present merely; it provides for and anticipates the wants of the future. The act of 1874 classifies cities by their population. The act of 18th of April, 1878, can hardly be said to be a classification of counties.

"It is true it speaks of all counties of more than 60,000 inhabitants. But it goes on to say: 'And in which there shall be any city incorporated at the time of the passage of this act with a population exceeding 8,000 inhabitants, situated at a distance from the county seat of more than twenty-seven miles by the usually traveled public road.' This is classification run mad. Why not say all counties named Crawford, with a population exceeding 60,000, that contain a city called Titusville with a population of over 8,000, and situated twenty-seven miles from the county seat? Or all counties with a population of over 60,000, watered by a certain river or bounded by a certain mountain. There can be no proper classification of cities or counties, except by population." * * *

The learned judge finds the fact that Crawford County is the only county in the State to which the act of the 18th of April, 1878, can apply at the present time. Said act makes no provision for the future, in which respect it differs from the act of 1874, which, in express terms, provides for future cities and the expanding growth of those now in existence.

That is not classification which merely designates one county in the Commonwealth and contains no provision by which any other county may, by reason of its increase of population in the future, come within the class. And the act of 1878 was held unconstitutional. In a more recent case in Pennsylvania, the doctrine of Patton's Case has been reaffirmed. Scowan's Appeal, 7 South. L. Rev. 921. In Illinois, an act of the legislature was, by its terms limited in its operations to counties "containing over 100,000 inhabitants."

And the Supreme Court of the State, in discussing that act, says: "Its very terms preclude it from having any application to any county except the County of Cook, for we take judicial notice no other county contains over 100,000 inhabitants, nor can it be expected that by any ordinary influx or increase of population, that any other county will have that population within the brief period fixed for the duration of thts law, viz.: within a period of six years from the time the act should take effect. No express words that could have been used by the General Assembly could limit the application of this act to the County of Cook more absolutely and definitely than those employed." Devine v. Cook, 84 Ill. 500. And in

a still later case, the same doctrine has been reasserted. Klokke v. Dodge, Ch. L. N. (Jan., 1881) 147. In Ohio, also, similar views are expressed. Thus, in State *ex rel.* v. Mitchel,31 Ohio St. 592, it is said; "It is true the act in question is in the form,in a sense, of a general law. But as was said in the case of the State *ex rel.* v. The Judges, 21 Ohio St. 11, the constitutionality of an act is to be determined by its operation, and not by the mere form it may be made to assume. The act is entitled "An act to provide for the improvement of streets and alleys in cities of the second class." And by the first section it is made applicable to "cities of the second class having a population of over 31,000 at the last Federal census." Columbus is the only city in the State having the population named at the last Federal census, and the act, therefore, applies only to that city, and can never apply to any other. The effect of the act would have been precisely the same if the city had been designated by name instead of by the circumlocution employed," And the act was held obnoxious to constitutional objections. Counsel for Herrmann cite other authorities which fully support those already cited, and there seems to be an entire unanimity in the later authorities in holding that laws such as have been already quoted and discussed, fall under the ban of Constitutions similar to our own.

The question then is, does sec. 4 of the Notary Act in the light of the authorities we have quoted, present objectionable features similar to those acts of other States, heretofore noticed? We are all of opinion that it does. And these are our reasons therefor:

The Notary Act, it will be observed, both by its title and its first section, applies only to "all cities having a population of 100,000 inhabitants or more." And section 4 repeals all inconsistent acts, and abolishes the office of any notary public in such city, holding a commission bearing date prior to the passage of this act, and whose term of office as such notary public has not expired at the time this act becomes a law. Now, "Courts will take notice of whatever ought to be generally known within the limits of their jurisdiction and public matters affecting the government of this country." Greenl. Evid. secs. 5, 6, and cases cited.

Among these matters are the official records of the census as to localities within their jurisdiction, and will take judicial notice that but one city in the State contains more than a certain number of inhabitants. Devine v. Cook, *supra*.

Taking judicial notice, then, as we must, of the official records of the census so far as relating to this State, we find that St. Louis was the only city in the State possessing 100,000 inhabitants at the time of the passage of the act, or which, by the usual increase of population, could be expected to have that number when the act took effect. This being ascertained, the City of St. Louis, under the authorities cited, is to be regarded as the city intended, and the only city intended, as much so as if called by name. But if St. Louis had been thus directly designated, no one would have the temerity to contend that such a law could withstand the charge of being a special law. But the section under discussion is to be regarded as a special law for the additional reason that it can by no sort of probability apply, except as to an existing state of facts; except as to those notaries whose commissions "bear date prior to the passage of this act." All that is necessary to do in order to ascertain what notaries in the City of St. Louis are ousted by the fourth section is to examamine the date of their commissions. If such a law is worthy the title of a general law, then, assuredly, one would be equally deserving of such title, which should designate notaries by the distance they reside from the court house, or their stature, the color of their hair or other individual peculiarities.

It is obvious beyond question that section 4 applies only to a certain city, to-wit: St. Louis, and only to a certain class therein, to-wit: those notaries commissioned prior to March 24, 1881, and whose commissions do not expire before June 26, 1881, thus bringing that section within the definition and distinction given and made by Dwarris between general and public acts and such as are special or private:

"That public acts relate to the public at large, and private acts concern the particular interest or benefit of certain individuals, or of particular classes of men."—Potter's Dwarris.

Judge Cooley says: "A statute would not be constitutional * * * * which should select particular individuals from a class or locality and subject them to peculiar rules, or impose upon them special obligations or burdens from which others in the same class or locality are exempt. * * * * Every one has a right to demand that he be governed by general rules, and a special statute which, without his consent, singles his case out as one to be regulated by a different law from that which is applied in all similar cases, would not be legitimate legislation, but would be such an arbitrary mandate as is not within the province of free governments." Cooley Con. Lim., p. 391.

Section 4 does just this prohibited thing. It selects particular individuals, *i. e.*, notaries whose commissions bear certain dates, from a general class, *i. e.*, all notaries in said jurisdiction, and subjects them to peculiar rules from which all others in the same class are exempt. Such a law can not be otherwise than special, and can justly bear no other name or designation. It is claimed by counsel for relator that State v. Hammer, *supra*, asserts a doctrine different from that approved by this court in State v. Tolle, 71 Mo. 645. There is no warrant for such assertion. We still adhere to the doctrine there approved, "that a statute which relates to persons or things as a class, is a general law, while a statute which relates to particular persons or things of a class is special." This definition is virtually the same as the one we

have already announced, and shows very conspicuously that section 4 belongs to that category of statutes which we have just seen relates to "particular persons * * * * of a class." But the statute under discussion in Tolle's case differs very widely from the one we are discussing. The section passed upon in that case was sec. 320 Rev. Stat. 1879, which made provision that: "In all cities having a population of more than 100,000 inhabitants, a board, consisting of the judges of the circuit court of such cities, or a majority of the same, shall, on or before the first day of November, 1879, and every two years thereafter, cause to be published," etc., and therefore filled the definition of a general law, and did not single out and relate to "particular persons or things of a class." That section related to "persons or things as a class," and more than that, it could only operate, and was only intended to operate, in the future, and its general rule would operate as fast as cities having a population of 100,000 inhabitants should give occasion to apply the law.

In the case at bar, on the contrary, it is simply impossible that section 4 should ever operate except upon an existing state of facts; except as to "particular persons of a class," and that class residents of a certain city, to wit: St. Louis. Its operation is centered upon those particular persons, and ceases when they are ousted according to its terms.

The section in question may be a general law in form, but courts of justice can not permit constitutional prohibitions to be evaded by dressing up special laws in the garb and guise of general statutes.

In discussing the section in question it has not been our purpose to say aught against the validity of other sections of the notary act. We may remark, however, that an act may be partly void and partly valid, if the parts are severable.

For the reasons aforesaid the judgment of ouster is reversed and the writ dismissed.

USURY — UNAUTHORIZED EXACTION OF AGENT — BONUS FOR LOAN.

NEW ENGLAND MORTGAGE SECURITY CO. v. HENDRICKSON.

Supreme Court of Nebraska, June 21, 1882.

The fact that an agent intrusted with money to lend exacts a bonus from the borrower for himself, over and above the legal rate of interest, will be binding upon the principal, although done without authority, and will taint the transaction with usury.

Appeal from York County.

Hull & Stearns, for plaintiff; *Montgomery & Harlan*, for defendants.

MAXWELL, J., delivered the opinion of the court:

This is an action to foreclose a mortgage. It is alleged in the petition that on the twenty-fifth day of November, 1876, the defendant Hendrickson executed and delivered to the plaintiff his promissory note for the sum of $250, due in five years, with interest from date at ten per cent. per annum; and to secure the payment of the same, executed a mortgage to the plaintiff on the west half of the southwest quarter of section 8, township 11, range 1, W. of the sixth P. M. The prayer is for a decree of foreclosure and sale of the mortgaged premises. The answer admits the the execution of the note and mortgage, but states that the plaintiff through its agent, Frederick W. Leidtke, made the loan in question to the defendant, and actually loaned to the defendant only the sum of $200, and that he has paid thereon the sum of $46.18. The case was referred to a referee, who found that the amount of money actually received by the defendant from the plaintiff was the sum of $189, which was the sole consideration for said note and mortgage, and that the defendant has paid thereon the sum of $46.18. The plaintiff filed a motion to set aside the report, which was overruled, and a decree of foreclosure and sale was rendered in its favor for the sum of $153.82. The plaintiff appeals to this court. The question involved in this case is one of the liability of the principal for the acts of its agents in exacting usurious interest in making the loan. Section 2 of ch. 28 of the Revised Statutes of 1866, which was in force at the time this loan was effected, provided that "interest upon the loan or forbearance of money, goods or things in action shall be at the rate of $10 per year upon $100, unless a greater rate, not exceeding 12 per cent. per annum, be contracted for by the parties."

The question to be determined is, is a principal who insists upon the validity of a contract made for him by an agent, bound by the acts of his agent in making the contract? As a general rule, the adoption of the agency in part adopts as a whole, because the principal is not permitted to accept and confirm so much of a contract, made by one purporting to be his agent, as he shall think beneficial to him, and reject the remainder. 1 Parson's Cont. (5th ed.) 51-2; Wilson v. Poulter, 2 Stra. 859; Smith v. Hodson, 4 T. R. 211; Hovil v. Pack, 7 East, 164; Brewer v. Sparrow, 7 B. & C. 310; Wright v. Crookes, 1 Scott (N. R.), 682; Hovey v. Blanchard, 13 N. H. 145; Farmers' Loan Co. v. Walworth, 1 Comst. 447; N. E. Marine Ins. Co. v. De Wolf, 8 Pick. 56; Culver v. Ashley, 18 Pick. 300; Bigelow v. Dennison, 23 Vt. 565; Hodnet v. Tatum, 9 Ga. 70; Elam v. Carruth, 2 La. Ann. 375; Cook v. Bank of Louisiana, Id. 324.

This principle is admitted, but it is said that it does not apply to a loan of money made by an agent for his principal. In the case of Acheson v. Chase [13 Cent. L. J. 198], decided by the Supreme Court of Minnesota, one Chase, a resident of New York, authorized one Alley, a resident of Minnesota, to loan money for him at 12 per cent. interest upon land security, to be ta-

taken in Chase's name; Alley to receive no compensation from Chase for his services, but was authorized by him to charge and collect from the borrower a reasonable compensation for making the loan. Acheson applied to one Parsons, a resident of Minnesota, for a loan of $500. Parsons promised to procure the money at 12 per cent., he to retain $65 for his services in effecting the loan. Parsons then applied to Alley for a loan of the desired amount, and promised him $50. With very much circumlocution in procuring the money, which has a very suspicious appearance, $500, less $68, was delivered to Acheson, $50 of this sum being paid to Alley and $18 to Parsons.

The court held that the principal was not affected by the act of the agent in making the loan. The court say: "Was the taking of the $50 by Alley a taking by defendant of a rate of interest greater than 12 per cent., the rate allowed by law when the loan in this case was made? We think not. The $50 may be considered either as a bonus, or as in part bonus and in part compensation for Alley's services in and about making the loan. If it was all bonus—that is to say, a gratuity without consideration—the taking of it was wholly the act of Alley, done upon his own responsibility. The defendant in no way authorized it. He knew nothing of it until after the loan was consummated and the money and papers had passed." In Condit v. Baldwin, 21 N. Y. 219, the plaintiff, a resident of New Jersey, placed in the hands of one Williams, an attorney at law in Wayne County, New York, $400 to invest for her at lawful interest. One Baldwin, a resident of Wayne County, applied to one Mills, a resident of that county, to procure a loan for him of $400, for two years, on his note. Mills applied to Williams for the loan. Williams stated that he preferred to loan the money on bond and mortgage, as in that event he would be paid for drawing the same and for examining the title. An arrangement was then entered into whereby Mills promised to pay Williams $25 as attorney's fees. Mills then received $400 from Williams and paid it to Baldwin, and charged him $40 for his (Mills') services. Of this sum Mills paid $25 to Williams. It was held by a divided court that this did not constitute usury. It is said (p. 224): "It is undeniable that Williams took and received the $25 paid for alleged services rendered by him. If he took and received it as the plaintiff's agent, then he took and received it for her and as her money." The decision is placed upon the ground that the plaintiff had not authorized the taking of usurious interest, and had not received the same, nor had any knowledge that it was received.

Comstock, Denio and Wells dissented. In the able dissenting opinion of Judge Comstock, it is said (p. 229): "I think it material next to observe that only one contract was made, which embraced the whole transaction. There was no agreement between the plaintiff through her agent and the borrower to lend $400 at lawful interest, and then a separate and distinct agreement between the agent and the borrower for the extra $25. It was all included in one contract. The agent said, in substance, 'I will lend you the $400 if, besides the legal interest which you pay to my principal, you will pay to me the sum of $25.' This was a single, indivisible proposition, and as such it was accepted by the borrower. In consideration of the loan he agreed to repay it at a certain day, with interest, and he agreed also to $25 more to the lender's agents. Here was one consideration and one agreement. The agreement might all have been expressed in one or two writings, or it might have been without any writing. In fact, one of these promises was evidenced by a promissory note; the other rested in parol. These circumstances are immaterial. There was but one original agreement, which included the whole subject. Where there is usury at the root at the transaction, it has never before been thought that the merely formal separation of the borrower's contract into different parts could take the case out of the statute. If the business had not been through an agent not a doubt would be entertained, because nothing is clearer in principle or better settled by authority, than that contracts are equally usurious whether the excessive interest be paid down or only agreed to be paid, and whether the payment be promised in the same instrument with the principal debt, or in a collateral agreement, oral or written. The test question always is whether the agreement for the loan includes more than lawful interest to be reserved or taken in any manner whatsoever."

This case was followed in Bell v. Day, 32 N. Y. 165, and Esterez v. Purdy, 66 N. Y. 446, as stated in the opinions, upon the principle of *stare decisis*. In Algur v. Gardiner, 54 N. Y. 360, it was held that where the extra sum paid to the agent was a part of the contract of loan—that is, where there was not an independent agreement for the benefit of the agent, but the sum charged for the use of the money was in excess of legal interest — it tainted the transaction with usury.

In Gokey v. Knapp, 44 Iowa, 32, it was held that where an agent for the loaning of money lent it at usurious rates it would not be presumed that he had authority to make the loan at usurious rates so as to affect his principal.

In the case of Payne v. Newcombe, 16 West. Jur. 89, decided by the Supreme Court of Illinois in November, 1881, one Payne, being the owner of about 400 acres of land in Livingston County, applied to one Newcomb, a loan agent in Chicago, for a loan of money. Various sums were loaned by Newcomb to Payne, amounting in the aggregate to the sum of $6,630, the notes being made payable to Herrick Stevens, and a trust deed to secure the same being made to one Pierce. When each loan was made, Newcomb deducted from the amount 5 per cent., which he claimed for commission for procuring the loan. There were several extensions of the time for payment, and when they were made he charged 2 and 1-2

per cent. for procuring them. When interest was not promptly paid it was compounded at the rate the notes bore. Payne paid in all $5,800 on the indebtedness, but Newcomb claimed there was still due $11,967.17. On a bill being filed for an account and to enjoin a sale under the trust deed, it was insisted that Newcomb was not the agent of Stevens when the several loans were made, but was the agent of the plaintiff in error (Payne), and had a legal right to charge for his services in procuring the loan. The court say: "This evidence of Newcomb's establishes the fact that he was Stevens' agent beyond all dispute. He, however, says that he was the agent of Payne before the loan, and of Stevens afterward. That an agent has to find the money, know the situation of the property, and ascertain the title, see to collecting the principal, interest, etc. That if the title proves defective, or the property is valued too high and loss ensues, it is understood that the agent renders himself personally responsible. We may ask, liable to whom? To his principal, of course. It the agent of the borrower when making the valuation and examining the title, and he over values the property, or title proves defective, what possible loss can result to the borrower? Then he must be liable to the lender, and if so, it can only be because he is his agent. And he proves this by his own testimony. He says he had to submit the application to Stevens, and if he made any mistakes in examining the title, that Stevens would have held him liable. Why should Stevens hold him liable for such losses if he was the agent of Payne until the loan was completed, and the agent of Stevens afterwards, as he testifies? If liable to Stevens for such mistakes, it was because and only because he was his agent; and that he was, in the examination of the property, fixing its value and determining the character of the title, we entertain no doubt. It would be absurd to suppose Stevens would loan his money on the valuation fixed and the title reported by Payne's agent. From all this testimony we are compelled to believe that Newcomb was the agent of Stevens from the time the application was made for the loan. The whole transaction is not susceptible of any other construction. It is apparent that Stevens regarded and relied on Newcomb as his agent, and would have held him liable for loss growing out of neglect of duty. Nowcomb testifies that Stevens would have held him liable for a mistake in examining the title. If so, then he was Stevens' agent as well before as after the loans were made, and no such distinction can be reasonably drawn as that Newcomb was Payne's agent before and Stevens' after the loans were made. Did Stevens know that Newcomb was charging for his services, and collecting it from the borrower? Newcomb says that it was the understanding that he was to get it from the borrower, and that establishes the fact beyond all cavil. Were these payments of commission of benefit or profit to Stevens? They unquestionably were, as they paid his agent for long continued and valuable services rendered by Newcomb for him. No one will believe that Newcomb thus incurred liability to Stevens, and rendered skilful and valuable services for him for more than twenty years, as a mere gratuity. It was not so understood, but Newcomb says he was to get his part from the borrower. Stevens then paid what he owed to Newcomb by requiring the agent to impose it on the persons to whom loans were made. The arrangement amounted to no more or less than requiring the agent to loan for a per cent. sufficiently high to yield Stevens the highest rate allowed by law, and to pay the agent for his responsibility, labor, skill and trouble." The court held that the principal was bound by the acts of the agent, and that the loans were usurious. Craig, C. J., did not concur, but upon what grounds does not appear.

In the cases of Rogers v. Buckingham, 33 Conn. 81, it is said: "This would unquestionably have been an usurious loan if made by David Bulkley. It was in fact made by his son, as his agent; the question in the case is, therefore, one of authority." * * * * "Such authority will not be presumed when the agency is special and limited to a single transaction." It may be presumed where the agency is general, and embraces the business of making, managing and collecting the loans of a moneyed man, and the facts found show such an agency in this case."

In all these cases the rule is recognized that if the commission paid to the agent was authorized or assented to by the principal, the loan will be tainted with usury. The case cited from Minnesota seems to go further, and hold that even if an agent receives a *bonus* in excess of lawful interest, it does not render the loan usurious. The law regulating interest fixes the maximum rate, and declares that "if a greater rate of interest than is hereinbefore allowed shall be contracted for or received or reserved, the contract shall not, therefore, be void; but if in any action on such contract, proof be made that illegal interest has been directly or indirectly contracted for or taken or reserved, the plaintiff shall only recover the principal, without interest, and the defendant shall recover costs; and if interest shall have been paid thereon, judgment shall be for the principal, deducting interest paid," etc. The statute applies to all loans of money, whether made personally by a principal, or through the intervention of an agent. If the sum exacted for the loan is in excess of the maximum fixed by law, the contract is thereby rendered usurious, whether the unlawful interest was contracted for by the principal himself, or paid as a commission to his agent for his services in making loans. If this was not so, a father could employ his son to make loans for him, or a business man one of his clerks, and these persons would be authorized to charge the debtor the highest rate of interest allowed by law, and in addition such commission to the agents as the necessities of the debtor would compel him to pay.

Such ruling would, in effect, repeal the law. It would change the plain, unambiguous language of the statute fixing the highest rate of interest allowed in any case, so as to impose no restriction whatever, because, if loans made by an agent are not restricted or controlled by the statute, all that is necessary to evade the law is to employ an agent to make the loan. It is said, however, that the principal is not bound by the acts of the agent where he exceeds his authority; that is, where he charges more than lawful interest, or retains a portion of the principal, as in this case, as a *bonus*. It is a sufficient answer to this objection to say that the agent is selected by the principal for the purpose of loaning its funds. The principal may require such security and impose such conditions upon such agent as it sees fit, and has the means at hand to protect itself from the illegal acts of its own employes. In this case it is claimed that the agent of the lender was the agent of the borrower for the purpose of procuring the loan; that is, that Hendrickson made the Corbin Banking Company his agent for the purpose of procuring the loan. The loan seems to have been effected through A. W. Ocabock, who appears to have been an agent of the Corbin Banking Company, and the banking company seem to have been acting as agent of the plaintiff. We are aware that there are strong denials of those facts in the testimony, but the conduct of the parties is conclusive on these points. In conclusion, we hold that where an agent is engaged in the business of loaning money for his principal at the highest rate allowed by law, and contracts for a bonus or commissions from the borrower in excess of lawful interest, the contract will be tainted with usury. The whole transaction is but one contract, and, being within the scope of the agency, the lender is bound by it. Olmsted v. N. E. Mfg. Sec. Co., 11 Neb. 487; s. c., 9 N. W. Rep. 650; Cheny v. Woodruff, 6 Neb. 185; Cheny v. White, 5 Neb. 256; Philo v. Butterfield, 3 Neb. 259.

The judgment of the district court is clearly right, and is affirmed.

WEEKLY DIGEST OF RECENT CASES.

IOWA,	1, 6, 12, 24, 25
KANSAS,	5, 7, 17
KENTUCKY,	22
MARYLAND,	10
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FEDERAL CIRCUIT COURT,	3, 4, 8, 19, 26, 28
FEDERAL SUPREME COURT,	9

1. ADMINISTRATION — TRUST FUND FOR PAYMENT OF DEBTS.

Where property was conveyed to defendant under a contract binding him to pay the debts of intestate and hold the balance of the proceeds of the property for the children of the deceased, or any one of them, such balance in the hands of the defendant would be a trust fund for the use of such children or child, and plaintiff, administrator of deceased could recover no part of it, unless it be shown that there were existing debts against the estate of deceased. *Griffith v. Parton*, S. C. Iowa, June 18, 1882, 12 N. W. Rep, 739.

2. ALTERATION OF WRITTEN INSTRUMENTS—MATERIALITY—GOOD FAITH AND HONEST INTENTIONS.

Whenever a note or other instrument is executed by two or more parties, any alteration in it without the consent of all, rendering the recourse of the party who has not assented more difficult and expensive, and where this is so it does not matter that the alteration was entirely honest and with no fraudulent intent, it will be deemed a material alteration. *Craighead v. McLoney*, S. C. Pa., 39 Leg. Int. 280.

3. ATTORNEY AND CLIENT—SUBSTITUTION OF ATTORNEYS — LIEN ON JUDGMENT FOR COMPENSATION.

An agreement was entered into by plaintiffs, by which a party, since deceased, was employed to prosecute their claim against the Government for alleged illegal exactions of duties and fees, which, during his life-time, he proceeded to do, employed attorneys, instituted the suit, and paid all the expenses of the proceedings, and, after death, his executrix assumed control, substituting attorneys and paying all expenses, and finally recovered judgment in favor of the plaintiff. *Held*, that the services of the deceased were in the nature of attorney's services, and that the long acquiescence of 13 years in the control of the proceedings by deceased and his executrix entitles the executrix to a lien on the judgment, and that plaintiff's motion to substitute their attorney be granted on payment to the executrix of one-half of the amount of the judgment, the amount specified in the contract. *Dodge v. Schell*, U. S. C. C., S. D. N. Y., June 15, 1882, 12 Fed. Rep. 515.

4. COMMON CARRIER— RAISED BILL OF LADING — NEGLIGENCE.

The fact that the shipper was allowed to fill the bill of lading in his own handwriting, and leave a blank which afforded apportunity for increasing the statement of the number of bales shipped, will not render the common carrier liable for loss occasioned by the forgery of the shipper in raising the bill of lading. *Lehman v. Central R. Co.*, U. S. C. C., M. D. Ala, 1882, 12 Fed. Rep. 595.

5. CONTRACT — PUBLIC POLICY — PURCHASE OF BANK STOCK.

N entered into a verbal contract with D, a director and the president of a national bank, to buy of the latter one hundred and fourteen shares of stock in the bank at $140 per share, upon the condition that he should be made cashier of the bank. Afterwards D notified N that he could not and would not comply with the contract. Thereupon N brought his action to recover damages for breach thereof. *Held*, the consideration of the contract being against public policy, the contract is void, and N not entitled to recover damages. *Noel v. Drake*, S. C. Kan., July, 1882, Judge's Headnotes.

6. CONTRACT—SALE OF GOODS — OPTIONAL DELIVERY—WAGERS.

The option as to the delivery of merchandise purchased is not illegal if there be an agreement to make actual delivery. The optional contracts which are void are such as do not contemplate the actual delivery of the commodity purchased, but rather contemplate that the subject of the contract is not to be delivered. *Gregory v. Wattowa*, S. C. Iowa, June 13, 1882, 12 N. W. Rep. 226.

7. EXEMPTION—INSTRUMENTS USED IN CALLING.

A resident of Kansas, not married and not the head of a family, carried on his sole business, that of "an insurance agent and abstractor of titles." and in doing so used the following articles of property: "One iron safe, and one set of abstracts, and one cabinet and table." *Held*, that under subdivision 3, of section 4, of the exemption laws (Comp. Laws of 1879, p. 438). the above mentioned articles are "instruments," within the meaning of said subdivision 3, and are exempt from execution. *Davidson v. Sechrist*, S. C. Kan., July, 1882, Judges' Headnotes.

8. FEDERAL JURISDICTION — COLLUSIVE ASSIGNMENT.

Where the plaintiff obtained the legal title to coupons sued on in order to enable him to bring the action, and pretended to pay for them by a check, which was not paid, and plaintiff in fact had no real interest in the coupons: *Held*, that the plaintiff is improperly and collusively made a party, and it is the duty of the court to dismiss the suit. *Fountain v. Town of Angelica*, U. S. C. C., N. D. N. Y., April, 1882. 14 Rep. 71.

9. FEDERAL PRACTICE — PROCEEDINGS SUPPLEMENTARY TO EXECUTION.

The examination of a judgment debtor to enable the creditor to discover property to be applied to the payment of his judgment may be directed by statute, and will be a legal remedy; and the Federal courts will follow the statute in ordering the examination. *Ex parte Boyd*, U. S. S. C.. April, 1882, 14 Reporter, 65.

10. GUARDIAN AND WARD - UNEXPENDED PROVISION FOR EDUCATION.

A fund was left by a testator to the testamentary guardian of his infant son, to be expended in the education of his son, in such sums and in such manner as the guardian in his judgment may think right and proper. A large part of the fund remained in the hands of the guardian unexpended, when the infant attained his majority, and was claimed by the infant, by residuary legatees, and also by next of kin of the testator. *Held*, that any part of the fund remaining in the hands of the guardian unexpended, belongs to the ward on his arrival at age. *Nyce v. Nyce*, Md. Ct. App., 8 Md. L. Rec., Aug. 5, 1882.

11. HOMESTEAD—VALIDITY OF HOMESTEAD LEGISLATION—WIFE MUST JOIN IN CONVEYANCE.

Under the title of "an act to exempt homesteads from judicial sale," it is competent for the legislature to provide that "a conveyance or encumbrance by the owner is of no validity, unless the husband and wife, if the owner is married, concur in and sign the same joint instrument," and a mortgage upon the homestead, signed by the husband alone, is void. *Bonorden v. Dressen*, S. C. Neb., June 21, 1883, 12 N. W. Rep. 831.

12. HUSBAND AND WIFE—CONVEYANCE OF LAND TO WIFE.

Where a husband conveys land to his wife, in an action by the creditors of her husband to set aside such deed and subject the land to the payment of the debts due to them, it is incumbent on the wife, in order to cut off the equity of the plaintiff, to establish that she paid value for the land without notice of plaintiff's equity. *Kaiser v. Waggoner*, S. C. Iowa, June 14, 1882, 12 N. W. Rep. 754.

13. HUSBAND AND WIFE—HUSBAND'S OBLIGATION TO SUPPORT HIS WIFE — MARRIAGE VOID ON GROUND OF INSANITY.

A man formally married a woman who, because of her insanity, which he discovered soon afterwards, was incapable of entering into the marriage contract, and continuing thereafter voluntarily to cohabit with her as his wife, is under a legal obligation to support her; and having furnished such support, he can not, upon a decree of separation on the ground of the invalidity of the marriage, make the same a charge against her separate estate. *Gerhold v. Wyss* S. C. Neb., June 21, 1882, 12 N. W. Rep. 811.

14. HUSBAND AND WIFE—WIFE'S SEPARATE ESTATE —LIABILITY ON COVENANT.

A certain sum of money was paid to a husband and wife, and in consideration thereof they covenanted to support one A B during the remainder of her natural life. *Held*, that the wife's interest in the sum was her separate estate, and that she, as well as the husband, was liable on the covenant. *Houghton v. Milburn*, S. C. Wis., April. 1882, 14 Rep. 96.

15. INSOLVENCY—COMPOSITION—FAILURE OF DEBTOR TO COMPLY WITH ITS TERMS.

In case the debtor fails to cemply with the composition, his liability on the debt again becomes active, and suit may be brought in any court in which it might have been brought had no bankruptcy proceedings been commenced, and the question of performance is there subject to trial. *Whitmore v. Stevens*, S. C. Mich., June 21, 1882, 12 N. W. Rep. 858.

16. INSURANCE, FIRE—WHAT IS A LOSS BY FIRE—PROXIMATE CAUSE.

The plaintiffs' goods, being insured by the defendants against fire, were upon a steamboat at the time of its collision with another vessel; fire at once broke out on the steamboat and rendered it impossible to run the engine or pumps to extinguish the fire, or to pump out the water flowing in through the breach caused by the collision. After some time the steamboat sank, carrying down the plaintiffs' goods, which were not burned nor actually touched by the fire. *Held*, that it was for the jury to decide, upon all the circumstances of the case, what was the proximate cause of the loss sustained by the plaintiffs, and whether it was the result of the fire. *New York, etc. Express Co. v. Traders' and Mechanics' Ins. Co.*, S. Jud. Ct. Mass., March, 1882, 14 Rep., 83.

17. JURY TRIAL—CHALLENGE OF JUROR FOR CAUSE —COMPETENCY.

The defendant was prosecuted, convicted and sentenced for murder in the first degree. While impanneling the jury one of the jurors stated on his *voir dire* that he was convinced that the deceased was dead and that the defendant had killed him, and that it would require a great deal of evidence to remove this conviction. The defendant challenged the juror for cause, but the trial court overruled the challenge. It appeared from the questions asked by the defendant's counsel to

other jurors before this challenge was overruled, that the death of the deceased and the killing of him by the defendant, were conceded. Also, immediately after the jury was impanneled the defendant's counsel stated to the jury that it would appear from the evidence that the defendant had killed the deceased, but that it would be shown that the killing was done in self defense; and the evidence did, in fact, show, beyond all doubt, that the deceased was killed by the defendant; and the record of the case also contains the following concession made by the defendant's counsel after the trial of the case, to-wit: "It is conceded by counsel for defendant that the verdict is sustained by the evidence and justified by the testimony." And the verdict of the jury was undoubtedly right. *Held*, that the trial court did not commit any material or substantial error in overruling the defendant's challenge of the juror for cause. *State v. Wells*, S. C. Kan., July, 1882. Judges' Headnotes.

18. JURY TRIAL—INCOMPETENCY OF JUROR—BIAS—CHARACTER OF OPINION FORMED AND EXPRESSED.
The formation and expression of an opinion are not alone the test of a juror's competency; but the nature of the opinion may be inquired into; and, if found to be only a transitory inclination of the mind, based upon rumor or newspaper report, etc., the truth of which the juror does not inquire, nor judge, it is not a disqualifying opinion. To work a disqualification there must be an abiding bias of the mind caused by substantial facts in the case, in the existence of which the juror believes; an opinion upon the merits of the case upon the guilt or innocence of the accused of the charge laid in the indictment upon the evidence substantially as expected to be presented on trial. *State v. Meaker*, S. C. Vt., Reporter's Advance Sheets.

19. NEGLIGENCE—MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE.
When the master or another servant standing toward the servant injured in the relation of superior or vice-principal, orders the latter into a situation of danger, and he obeys and is thereby injured, the law will not charge him with contributory negligence, unless the danger was so glaring that no prudent man would have entered into it, even under orders from one having authority over him. *Miller v. Union Pac. R. Co.*, U. S. C. C., D. Colorado, June, 1882, 12 Fed. Rep., 600.

20. NEGLIGENCE—MASTER AND SERVANT—NEGLIGENCE OF FELLOW-SERVANT.
Plaintiff's intestate, while working as fireman on an engine on defendant's road, was killed by a sudden plunge of the engine into a raceway, caused by a misplaced switch. It appeared that defendant had reduced the force at the depot and put extra work on the switchman, who was an old man; but it also appeared that the failure to close the switch was the result of sheer carelessness on the switchman's part. *Held*, that the switchman was a coservant of intestate, and that no recovery could be had unless some neglect of defendant as principal also contributed to produce the injury; that it was immaterial what fault defendant may have committed in reducing the force or putting extra duties on the switchman, as it did not appear that such fault contributed to produce the injury. *Harvey v. New York, etc. R. Co.*, N. Y. Ct. App., April 11, 1882, 1 N. Y. Con. Rep., 332.

21. NEGLIGENCE—OVER DRIVING HIRED HORSE—EVIDENCE.
Where, during a ride, the driver of a horse has a conversation with his companion as to the horse's appearance and condition, and the conversation tends to show that the driver is exercising due care, it is admissible for that purpose in an action against the driver for injury alleged to have been caused the horse by his ill usage and neglect. *Pinney v. Cahill*, S. C. Mich., June 21, 1882, 12 N. W. Rep., 862.

22. NEGOTIABLE INSTRUMENTS — NOTE INDORSED FOR COLLECTION—PAYMENT TO STRANGER.
Payment of a note which has been specially indorsed to a bank for collection, to a person who has no right to collect it, is made at the risk of the payer, the indorsement being notice that no one other than the bank or a *bona fide* owner has the right to collect. *Barnett v. Ringgold*, Ky. Ct. App., May, 1882, 14 Rep., 76.

23. NEGOTIABLE PAPER — ACCEPTANCE — PAYEE'S KNOWLEDGE THAT THE ACCEPTANCE IS ON FAITH OF CONSIGNMENT.
The acceptance of a bill of exchange, unconditional on its face, will bind the acceptor as against the payee, notwithstanding the payee's knowledge that the bill has been accepted on the faith of a consignment to be made to the acceptor, which consignment is prevented by the payee's attaching the goods for other claims against the drawer. *Bockover v. National Mechanics, etc. Bank*, S. C. Pa., January, 1882, 11 W. N. C., 570.

24. NEGOTIABLE PAPER—UNCERTAINTY.
A promissory note in the ordinary form contained the following clause immediately preceding the signature: "If this agent does not sell enough in one year, one more is granted." *Held*, that such provision rendered the note non-negotiable. *Miller v. Poage*, S. C. Iowa, 11 Am. L. Rec., 32.

25. PARTNERSHIP—ASSIGNMENT FOR BENEFIT OF CREDITORS—POWERS OF PARTNERS.
One partner can not make a general assignment for the benefit of creditors, except in the absence of the other partner or partners, or when from some valid reason there can be no consultation had. *Lieb v. Pierpont*, S. C. Iowa, June, 1882, 14 Rep., 77.

26. POST OFFICE—REMEDY FOR REFUSAL OF POST MASTER TO DELIVER MAIL MATTER.
Where the post master refuses to deliver registered letters and letters containing money orders, and other matter addressed through the mail, on which postage has been prepaid, the remedy of the aggrieved party is by *mandamus* or replevin, and not by injunction. *Boardman v. Thompson*, U. S. C. C., D. Ky., July 18, 1882, 12 Fed. Rep., 675.

27. RECORD—MORTGAGE—LIEN — FAILURE OF RECORDER TO INDEX.
Where a mortgage is left for record and actually recorded, its lien will not be postponed to a subsequent judgment, by reason of the fact that the recorder has failed to enter the same on the book of entries, or upon the index. *Wyoming National Bank's Appeal*, S. C. Pa., March 27, 1882, 11 W. N. C., 567.

28. REMOVAL OF CAUSE—TIME OF APPLICATION.
After a cause in the State Court has been brought to trial and a decree entered from which an appeal has been prosecuted to the Supreme Court of the State, where the decree of the lower court has been reversed and the cause remanded with directions to enter a decree in accordance with the opinion of the Supreme Court as to the rights of the parties, it is too late to remove the case to the Federal Court under the act of Congress in rela-

tion to removal of cases, approved March 2, 1867. *Darst v. Peoria*, U. S. C. C., N. D. Ill., 14 Ch. Leg. N., 383.

29. SALE — FAILURE OF CONSIDERATION — OVER-ISSUED STOCK.

The rule that a party selling as his own, personal property of which he is in possession, warrants the title to the thing sold, and that if, by reason of defect of title, nothing passes, the purchaser may recover back his money, though there be no fraud or warranty on the part of the vendor, does not apply to the case of a *bona fide* vendor of over-issued stock of a corporation; as he has a title which he can transfer and a remedy against the corporaton. *People's Bank v. Kurtz*, S. C. Pa., 39 Leg. Int., 288.

30. WITNESS—PRIVILEGE FROM ARREST.

Parties and witnesses attending in good faith any legal tribunal, with or without a writ of protection, are privileged from arrest on civil process during their attendance, and for a reasonable time in going and returning; and this immunity extends to all kinds of civil process, and affords absolute protection. *Larned v. Griffin*, U. S. C. C., D. Mass., July 6, 1882, 12 Fed. Rep., 590.

RECENT LEGAL LITERATURE.

LAW OF STOCK BROKERS. A Treatise on the Law of Stock Brokers. By Arthur and George Biddle. Philadelphia, 1882: J. B. Lippincott & Co.

This work is compactly written and is but little in excess of the convenient size of four hundred pages. The subject matter, being to a very considerable extent made up of the customs and usages peculiar to a certain craft, it follows as a consequence that few of the profession are familiar with the transactions in which the principles discussed are applied. The busy lawyer, to whom the slang of the stock exchange is a barbarous jargon, who is suddedly called upon to consider some of the numerous intricate questions arising from dealings on "'Change," will not only find this work a boon and a mine of fresh information, but we apprehend will be particularly pleased to find it in such compact and available shape. The work is well and clearly written, and will be a most valuable addition to the library of those members of the profession having occasion to investigate the questions treated.

TEXAS PLEADING AND PRACTICE. The Rules of Pleading and Practice in the Courts of Record of the State of Texas. By John Sayles and B. H. Bassett. Third Edition. St. Louis, Mo., 1882: The Gilbert Book Company.

The object of this work is not to offer to the profession a new treatise on the subject of pleading and practice in general. But, assuming a familiarity on the part of the reader with the works of Chitty, Story, Gould, Stephen and Mitford, the authors confine themselves to an attempted arrangement under appropriate headings of the provisions of the statute of Texas and the rules of decisions of its courts. In other words, its sphere is supplemental to the body of the literature on this topic, and as such it can not fail to be very valuable to the Texas practitioner, to whom, especially, it is addressed. The citation from Texas authorities is very abundant, but we think that a mistake was committed in adopting the plan of citing cases by the volume and page merely, without giving the titles of the cases. In the system pursued, no practicable amount of care in verifying citations, will prevent the occurrence of frequent errors.

SIXTH SAWYER. Reports of Cases Decided in the Circuit and District Courts of the United States for the Ninth Circuit. Reported by L. S. B. Sawyer. San Francisco, 1882: A L. Bancroft & Co.

The mechanical execution of this work is excellent. The character of the cases reported is the same in all substantial particulars as in its predecessors. The opinions have not, in many instances, the merit of brevity, and consequently it is fortunate that the reporter has devoted but little space to statements of case and the arguments of counsel.

MANUAL FOR ASSIGNEES. A manual for Assignees, Insolvent Debtors and others affected by Assignments in Ohio, in Trust for the Benefit of Creditors, or to avoid Arrest, with Forms, Notes of Decisions and Practical Suggestions. By Florien Giaque. Cincinnati, 1882: Robert Clark & Co.

The design of this work, as stated by the author, is to furnish a convenient, reliable and labor saving guide to all who are interested in assignments in trust for the benefit of creditors in Ohio, either as probate jgdges, as members of the bar, as parties to such assignments, or as creditors of insolvent debtors, etc. The work seems carefully and honestly done. The style is clear, and, as should be the case in a book intended, to some extent, for non-professional readers, free from technicalities. For the same reason, too, the text is not encumbered with a superabundant citation of authority. The forms are scattered through the body of the work, under the appropriate headings, a much more convenient and logical arrangement, it seems to us, than the plan usually pursued, of bunching them together, in a sort of appendix at the end of the volume, after the plan pursued by the unfortunate editor who, tortured with the conflicts and doubts arising from discordant rules for punctuation, withdrew the troublesome points altogether from the body of the volume, and printed at the end several pages of commas, semicolons, periods, etc., with a short note suggesting that the reader distribute them wherever theory or fancy should suggest.

QUERIES AND ANSWERS.

[*** *The attention of subscribers is directed to this department, as a means of mutual benefit. Answers to queries will be thankfully received, and due credit given whenever requested. To save trouble for the reader each query will be repeated whenever an answer to it is printed. The queries must be brief; long statements of facts of particular cases must, for want of space, be invariably rejected. Anonymous communications are not requested.*

QUERIES.

11. Is a stockholder's liability (of a savings bank, where charter provides that in case of default, stockholder shall be liable for double amount of stock) in the nature of a statutory penalty? L. J. B.
Chicago, Ill.

12. Has the master of a ship the right to enjoin a board of health from collecting a quarantine fee, without special authority by power of attorney from the owners, legally taken out for that purpose? H.
New Orleans, La.

13. Art. 7, sec. 15, Constitution of Wiscosin, provides: "Justices of the peace shall have such civil and criminal jurisdiction as shall be prescribed by law." *Quære:* The general law gives to justices of the peace jurisdiction to hear, try and determine all charges for assault and battery arising in their respective counties; can the legislature divest justices of the peace in cities of this jurisdiction, and transfer it to some other court? K. S.
Milwaukee, Wis.

14. A, the assignee for the benefit of the creditors of an insolvent debtor, upon reducing a portion of the property assigned to money, made a general deposit of it in a bank, to the credit of A, with the word "assignee" appended to his name. Can a judgment creditor of A's, in the absence of other property to satisfy the execution against A, maintain proceedings in garnishment against the bank, under the laws of Nebraska? H.
Schuyler, Neb.

15. Under sec. 5408 Rev. Stat. 1879, and sec. 6750 same, can tax payer pay all of the following taxes in county warrants, to-wit: county revenue, county special, county sinking, county judgment? If not, give authorities. And are not the following taxes illegal, to-wit: county revenue, $1.25 on hundred; county special, 60 cts.; county sinking, 20 cts.; county u dgment, 40 cts., over and above 50 cts. for the first, and all of second, it being for county expenses, and all of fourth, not required to pay valid bonded indebtedness? TAX PAYER.
Gainesville, Mo.

16. A sold land as follows: An undivided one-fourth to B, C and D, in the proportion of one-half of the one-fourth to B, and one-half of the one-fourth to C and D. At the time of the sale, a recorded judgment of foreclosure was outstanding against the entire undivided one-fourth sold. The grantees, B, C and D, agreed jointly and severally to assume and pay said judgment as a part of the purchase money. B and C subsequently became financially embarrassed, and D was obliged to pay the whole amount of the judgment. What are D's rights and remedies as against his co-grantees, B and C? D. E. W.
Oshkosh, Wis.

17. The Illinois reports are full of *dicta* to the effect that the action of forcible entry and detainer is purely possessory; that it is maintainable only for injury to the plaintiff's actual (not constructive) possession: and that title can not be tried therein, nor (in most cases) evidence of title submitted; but that the relation of landlord and tenant must be first established. On Jan. 1, 1881, A leased an unimproved lot in Illinois to B for one year. During the tenancy B erected a frame house on the lot and sold the house to C. At the expiration of the tenancy, B moves out, leaving the premises for a few days unoccupied. Thereupon, and before A has taken actual possession, C, claiming the house, moves in without A's knowledge, and so remains in possession of the premises after due demand by A. Under the Illinois statute, can A maintain forcible entry and detainer against C? If so, must he not first establish his legal title to the premises? Are there any Illinois authorities on this point?
Chicago, Ill. W. R.

18. A promissory note is given which includes the phrase "with attorney fees." On the day after maturity, the note was presented to the maker by an attorney, with attorney fees taxed upon the same. Can such fees be collected off the maker? In other words, when, in such note, are attorney fees mature?
Danville, Ind. M. W. H.

19. A, being indebted, executed to B, in 1875, in Missouri, his promissory note for $50, payable six months after date. At that time A was insolvent, and remained so until recently, when B called upon him for payment and threatened suit, stating, at the same time, that he had long since destroyed the note under the supposition that it would never be worth anything. How can B collect his debt? Can he recover under sec. 2852 Rev. Stats. Mo., providing for the institution of suits on instruments lost or destroyed, or does his voluntary destruction of the note amount to a cancellation thereof? JAMBON.
St. Louis, Mo.

20. A sued and obtained judgment against B in the 10th Judicial Circuit. B appealed to the Supreme Court, and died while the cause was pending in that court, leaving no estate. Now, as there can be no administrator where there is no estate to administer, and consequently there is no one to be made a party defendant as the representative of B, and the court can not render judgment against the deceased, how can A enforce his judgment? Can he collect of the securities on the appeal bond? JAMBON.
St. Louis, Mo.

21. Section 3, chap. 57, Gen. Stats. Ky., provides: "If the life of any person, or persons, is lost or destroyed by the wilful neglect of another person, or persons, company, or companies, corporation, or corporations, their agents, or servants, then the widow, heir, or personal representative of the deceased, shall have the right to sue such person, etc." 1. Under this statute does a right of action accrue (a) jointly to all the persons named; or (b) separately to each of them; or (c) only to the one who sues first; or (d) primarily to the widow, and if none, or if she refuses to sue, then to the heirs, etc., in the order named? 2. May a compromise with the widow be pleaded in bar of an action brought by the heirs or personal representative? B. & S.
Lexington, Ky.

QUERIES ANSWERED.

Query 9. [15 Cent. L. J. 78.] A makes the following provisions in her will: "1st. My funeral expenses shall be paid first of all; next, all my

indebtedness. 2d. I further request, after my debts have first been paid, my beloved husband S shall have his maintainance during his natural life and funeral expenses out of my estate, provided there be sufficient to do so. I further desire that after the death of my husband the remainder of my estate, if any, be divided equally between (naming five persons). * * * Should my personal property not be sufficient to pay off my indebtedness, my executor may, at his option, dispose of my real estate in such manner that my bequests and desires may be fully complied with." The executor pays the debts with personal property, makes final report and is discharged. The real estate rents for barely enough to maintain S, the husband. Now, has S a life estate in the land, or is his maintenance a mere charge on the real estate, and is his interest in the land subject to execution? K.

Kokemo, Ind.

Answer. S has a life estate in the land, also a one-third interest in fee, both of which are subject to execution. See 3 Br. C. C. 347; 2 Y. & C. 18; 3 Ves. 349; 13 Barb. 106; 4 Barb. 20; 20 Texas, 731; 2 Riley Ch. 5; 1 Spears. Eq. 322; 1 Sand. 325. Pomeroy in his Equity Jurisprudence, vol. 1, page 541, cites 81 cases in support of this rule. What is given by the will is in addition to statutory rights. See O'Hara v. Stone, 48 Ind. 417, for construction of our statute.

Indianapolis, Ind. O. T. BOAZ.

Query 62. [14 Cent. L. J. 499.] Has any one of the United States ever abolished the grand jury system of proceeding against criminals, or is there now any State in which that system is not in vogue? M. J.

St. Louis, Mo.

Answer. The grand jury system has been practically abandoned in Kansas. Sec. 24, p. 538, Gen. Stats. 1868, provides, that: "Whenever the county commissioners of any county shall request that a grand jury be summoned to attend at any term of the district or criminal court of such county, such court may order that a sufficient number of qualified jurors be drawn at a time specified by the court, and summoned to attend at such term and serve as grand jurors." We have no grand jury except in the above case, and it is sufficient to say that the commissioners very seldom request one. The provisions of our statute relative to the preliminary examination and binding over of persons accused of crimes, is very similar to that of Michigan, quoted in 15 Cent. L. J. 60, in answer to above query. R. G. R.

Holton, Kan.

NOTES.

——In France prisoners sentenced to death stand in quite a different position to that of English convicts in the same case. They receive no intimation of the date when their execution will take place. The Court of Cassation to which they have appealed may perhaps not call up their case for a couple of months; and after that some more days will be occupied in forwarding a *recours en grace*, or petition for mercy, to the President of the Republic. M. Grevy is opposed to capital punishment; but not so determinedly opposed to it as never to have signed a death warrant. He has allowed three men to be guillotined out of about sixty who have been sentenced to death since his accession, and this proportion, small as it is, is sufficient to prevent murderers from feeling absolutely reassured as to the fate awaiting them. They hear nothing of what is being done for or against them outside the prison walls. The *avocats* who defended them draw up the *recours en grace*, but the convicts are not supposed to know what chances there are of these petitions being entertained or rejected. If a convict is to be executed, the first certain intimation which he receives of the painful fact comes about a quarter of an hour before his head drops into the sawdust basket of the guillotine. Some morning—it may be two or three months after his trial—he is aroused at break of day by the governor of the prison entering his cell and saying kindly: "A——, your appeal has been rejected, and your petition dismissed; the moment has arrived * * *" The unhappy man, rolling out of bed and staggering to his feet, sees the jail chaplain, who has walked in behind the governor, and two or three warders who assist him hastily to dress. From this moment everything is done with the utmost celerity. The prisoner has wine pressed upon him; three minutes are allowed him to make his shrift, then he is led out and pinioned. Next moment he is half conducted, half pushed, into the open air, where the guillotine stands surrounded by dense squares of mounted troops and police, behind whom are massed large crowds straining their eyes, with not much effect, to see what is about to take place. The modern guillotine is not erected on a platform, but is placed on the ground. The convict makes half a dozen steps; the executioner's assistants seize him, push him roughly against an upright board, which falls forward, pivoting under his weight, and brings him in a horizontal position with his neck between the grooves, above which the knife is suspended. The executioner touches a spring; the knife flashes as it falls; and all is over. Watch in hand, it has been reckoned that when all the preliminaries of execution are smartly conducted, no more than fourteen minutes ought to elapse from the time when the convict is startled out of sleep to the instant when his head and body part company. From the Christian point of view, it is certainly deplorable that a convict having a sure knowledge of his impending death, should never be able seriously to prepare his mind for it. But the French act upon the principle of making things as easy as possible for the doomed man. Even the prison chaplain thinks it his duty to hold out hopes of a commutation, though he may have no good reason for feeling that the sentence will not be carried out. The convict then passes his last weeks of existence in a fool's paradise. He is encouraged to smoke, he is allowed enough wine to make him, if not drunk, at least merry—that is a quart a day—and the warders in his cell play cards with him as much as he likes—it being their chief care to keep the man from moping and giving them trouble.—*Cornhill Magazine.*